

*Res. Reply Brief*

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STATE OF WASHINGTON

BY *[Signature]*

DEPUTY

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

DAVID MOELLER,

Appellant,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON and  
FARMERS INSURANCE EXCHANGE,

Respondents/Cross Appellants.

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REPLY BRIEF OF RESPONDENTS/CROSS APPELLANTS

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*pm 8/16/04*

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## INTRODUCTION

Respondents/Cross Appellants Farmers Insurance Company of Washington and Farmers Insurance Exchange (collectively, “Farmers”) have cross appealed the trial court’s order certifying this case for class action treatment under CR 23(b)(3). As explained in Farmers’ opening brief, if the trial court’s summary judgment is affirmed, the cross appeal will be moot. In the event, however, that the judgment is reversed in whole or in part, Farmers respectfully submits this reply in support of its challenge to the class certification ruling.

## ARGUMENT

### **I. Moeller Ignores the Difference Between Injury and Damages – and the Significance that the Difference Has in Class Certification Decisions**

Moeller makes three mistakes with his argument that Farmers “incorrectly asserts” that certification was improper due to Moeller’s inability to prove classwide injury at trial. Reply Brief of Appellant/Brief of Cross Respondent (“CR Br.”) at 34-45. First, he confuses injury with damages. Second, he misstates the rulings in other class certification cases. Third, he mischaracterizes the significance of his admission that some members of the putative class have suffered no injury. Moeller’s confusion of injury with damages continues when he tries to defend the trial court’s shifting of the burden of proof. *Id.* at 45-47.

**A. The Concepts of Injury and Damages are Legally Distinct.**

Although Moeller tries to convince this Court to overlook the distinction between injury and damages, the concepts are different. Injury is a component of liability; damages are the monetary compensation an injured party is awarded after liability is established. When a party, as here, asserts a claim for breach of contract or a statutory violation, liability is established only with proof of (1) a contractual or statutory duty, (2) breach of the duty, *and* (3) injury to the claimant proximately caused by the breach. See Northwest Indep. Forest Mfrs. v. Dep't of Labor & Indus., 78 Wn. App. 707, 712, 899 P.2d 6 (1995). Damages come into the picture only when liability is established.

**B. Inability to Prove Classwide Injury Defeats Certification as to Liability Under Rule 23(b)(3).**

In Smith v. Behr Process Corp., 113 Wn. App. 306, 323, 54 P.3d 665 (2002), this Court did not rule, as Moeller suggests, that the plaintiff was not required to make a classwide showing of injury. Rather, when the case went to trial, the jury was advised that certain facts had already been established. Id. at 317. These facts included that the class members had been damaged (*i.e.*, injured) as a direct and proximate result of Behr's acts or omissions. Id. In other words, classwide injury had already been established. (The trial court entered a default judgment as to liability,

determining classwide injury as a discovery sanction instead of requiring plaintiffs to prove causation and injury at trial. Id. at 316-17.) Thus, the Behr decision does not “foreclose” Farmers’ argument, as Moeller claims.

Moeller makes a similar mistake in his analysis of the court’s opinion in Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975). CR Br. at 38-39. In that case, stock purchasers brought a class action for securities fraud. They claimed that the publicly traded company, its principal officers and its independent auditor misrepresented the company’s financial condition, thereby injuring every person who bought the company’s stock at an artificially inflated price.

On review, the Ninth Circuit rejected the defendants’ argument that individual questions of damages precluded certification under Fed. R. Civ. P. 23(b)(3). The court observed that “[t]he amount of damages is invariably an individual question and does not defeat class action treatment.” 524 F.2d at 905. Nowhere, however, did the court state that plaintiffs could proceed with the case as a class action without showing they could prove classwide injury. To the contrary, the court noted that plaintiffs’ theory supported “a source of inflation common to every purchaser.” Id. at 904; see also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 179-80 (3d Cir. 2001) (explaining that in fraud-on-the-market cases, such as Blackie, “the price at which a

stock is traded is presumably affected by the fraudulent information, *thus injuring every investor*” (emphasis added) who buys the stock at the inflated price).

Nevertheless, Moeller attempts to conflate the concepts of injury and damages. He argues that because class members who bought *and* sold their stock within the class period “suffered no damages,” CR Br. at 38-39, the Blackie plaintiffs were not required to prove classwide injury. Moeller is wrong: each class member was injured when the stock was purchased at an inflated price. Damages for that injury may have been mitigated by a subsequent sale also at an inflated price, but the injury occurred when the stock was purchased. That injury could be proved to have been sustained by every class member.

Similarly, in In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124 (2d Cir. 2001), cert. denied, 536 U.S. 917 (2002), an antitrust case also cited by Moeller, CR Br. at 38, the court distinguished between proof of injury and proof of damages. The court found that plaintiffs’ overcharge theory (i.e., that defendants unlawfully required every single class member to overpay for consumers’ use of off-line debit cards) would permit plaintiffs “to establish injury-in-fact on a class-wide basis.” 280 F.3d at 136-37; see also id. at 136, 140 (observing that plaintiffs had demonstrated they would be able to prove the substantive elements of the

antitrust violations, including injury and causation, on a classwide basis). On the other hand, the court recognized that based on defendants' mitigation defense, individual issues might be raised in connection with the calculation of each class member's damages. See id. at 138-40. After noting that "[c]ommon issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues," id. at 139, the court affirmed the class certification order. The case thus does not stand for the proposition Moeller suggests, i.e., that common issues of fact or law can be found to predominate even if no ability to prove classwide injury is demonstrated.

Finally, Sitton v. State Farm Mut. Auto. Ins. Co., 116 Wn. App. 245, 63 P.3d 198 (2003) does not help Moeller. In that case, plaintiff insureds sued their auto insurance company for breach of contract, bad faith and violation of the Consumer Protection Act based on the allegation that the insurer had a common practice of using medical utilization reviews to limit or deny its insureds' personal injury protection claims. On discretionary review of the trial court's class certification decision, the appellate court ruled that the predominance standard of CR 23(b)(3) might be met with respect to the *issue* of whether the insurer had improperly used medical utilization reviews, but because the harm alleged was individual to each insured, plaintiffs could not escape their obligation to

make individual showings of harm. Id. at 254-58. The appellate court rejected plaintiffs' effort to have the jury assess aggregate damages before addressing liability.

Even though the Sitton court affirmed class certification as to the issue of the propriety of the insurer's use of medical utilization reviews, it rejected certification of the liability determination because injury (causation and damages) was an individualized issue. In this case, even if Sitton might support certification on the issue of coverage, it would not permit certification of liability.

**C. The Trial Court's Failure to Recognize that Moeller Cannot Establish Classwide Injury Resulted in the Erroneous Conclusion that Common Issues of Fact and Law Predominate.**

Although Moeller describes at length how he proposed to prove classwide injury and classwide damages, CR Br. at 6-16, *he fails to acknowledge the significance of his admission that not every vehicle belonging to an insured is diminished in value when it is damaged in a collision and subsequently repaired.*<sup>1</sup> During the oral argument on

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<sup>1</sup> Included in Moeller's recital is a discussion of work performed by Moeller's statistical expert *after* the class certification ruling. CR Br. at 13-16. This, of course, is merely a one-sided view of evidence Moeller would proffer at trial, but the discussion is irrelevant because the issue on the cross appeal is whether the trial court abused its discretion in granting

Moeller's class certification motion, Moeller's counsel conceded that damaged and repaired cars that were involved in previous collisions resulting in damage to the same parts of the cars suffered no diminished value. RP (Class Action Certification Hearing, June 27, 2002) 77; see also CR Br. at 39. In those situations, class members owning such vehicles suffer no injury. This case therefore is distinguishable from Blackie and Behr because neither the theory of Moeller's case nor his proposed methods of proof will enable Moeller to establish classwide injury.

Another way to see the flaw in Moeller's argument is to look more closely at the nature of the alleged injury. Although Moeller argues that

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class certification based on the evidence available to it when it rendered the ruling.

Moreover, while an appellate brief is not the place to point out all the flaws in a purported expert's report and underlying methodology, suffice it to say that Farmers has a multitude of grounds to challenge the methodology and conclusions reached by Moeller's alleged experts. In a proper evidentiary hearing, Farmers would also correct Moeller's misleading characterizations of Dr. Welch's testimony. Moreover, although Moeller told the court at the class certification hearing that common evidence *could* show that diminished value always occurred on vehicles within the class, he now admits that not every car within the class sustained diminished value when it was involved in a collision and subsequently repaired.

Finally, Farmers objects to Moeller's description of Dr. Siskin's post-certification work given the inaccuracy of Moeller's record citations and his failure to maintain the confidentiality of information subject to the Stipulated Protective Order entered by the trial court – especially after

“diminished value exists the moment a vehicle is in an accident,” CR Br. at 7, that alleged diminished value in and of itself is not the injury of which Moeller complains. Because Farmers did not cause the accident, Moeller must look elsewhere for an injury for which he can hold Farmers liable.

That place is Moeller’s insurance policy, which required Farmers to pay for “loss” to Moeller’s insured car. Because “loss” is defined as damage to the insured’s car, Moeller claims an insured suffers legally compensable injury when Farmers refuses to pay for the car’s alleged diminished value. But the insurance policy also allows Farmers to pay the loss (i.e., avoid any breach of its obligation to pay for loss) by repairing the damaged car and it limits Farmers’ liability for loss to the amount it would cost to repair or replace the damaged property with other of like kind and quality.

Setting aside for purposes of this cross appeal the coverage question of whether repairing an insured car fully satisfies Farmers’ contractual obligation, these contractual provisions are significant for they mean that the “injury” claimed in this case cannot be determined in the

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Moeller opposed Farmers’ trial court motion to remove the confidential designation Moeller had appended to Dr. Siskin’s report.

abstract, as of the time of the accident, as Moeller argues. Because this is a contract case, any alleged proximately caused injury can only be determined by comparing the condition and value of the insured vehicle itself before the accident and after the repair. See Defraites v. State Farm Mut. Auto. Ins. Co., 864 So. 2d 254, 261 (La. Ct. App.) (rejecting a presumption of inherent diminution in value and acknowledging that any plaintiff seeking to recover additional damages beyond the cost of repair must individually allege and prove that the value of plaintiff's vehicle was diminished), writ denied, 869 So. 2d 832 (La. 2004); cf. In re Roberts, 210 B.R. 325, 330-31 (Bank. N.D. Iowa 1997) (acknowledging existence of industry standards for valuing used vehicles, but observing that the actual value of a used car can vary widely from the standard, based on the car's condition); Schwendeman v. USAA Cas. Ins. Co., 116 Wn. App. 9, 22-23, 65 P.3d 1 (2003) (observing that when an insured's damaged vehicle is repaired, determining whether use of a part made by someone other than the original equipment manufacturer complied with the insurer's contractual repair obligation "necessarily require[d] ascertaining the condition of the vehicle before the accident in terms of its age, mileage and physical condition, and the quality of the replacement part").

Moeller's theory is that damage of certain sorts reduces a car's value because evidence of certain repairs will always exist, and buyer

psychology accordingly reduces the amount the car would bring in the market. Farmers disputes that, but Moeller planned to attempt to prove it at trial. Nevertheless, Moeller admitted that no injury occurs in those cases where the car had prior damage to the same location. Moreover, a complete repair may include actions (e.g., repainting) that correct prior deficiencies in the car's condition (e.g., a rock-chipped hood). So even if there is residual damage from the new accident, the benefits of the repair to preexisting damage may offset, in whole or in part, the impact on value of any residual damage. Even assuming Moeller's basic theory, only by assessing the preaccident condition of each and every car can class members with diminished value injuries be identified.<sup>2</sup>

In other words, the determination of whether a class member has suffered any potentially compensable injury requires an individualized assessment. See Sitton, 116 Wn. App. at 253, 258-59 (acknowledging that

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<sup>2</sup> Moeller's reference to a "few potential outlier class members," CR Br. at 40, is disingenuous given that the record contains no evidence as to how many class members may have sustained diminished value injuries and how many did not. Nor does Moeller cite any cases for the proposition that if only a "few" class members suffered no injury, the court can proceed to determine liability for the class as a whole and merely adjust the aggregate amount of damages. Indeed, this was the approach explicitly rejected by the Third Circuit in Newton, 259 F.3d at 187-89. Accord, e.g., Muise v. GPU, Inc., 371 N.J. Super. 13, 851 A.2d 799, 820-23 (N.J. Super. Ct. App. Div. 2004).

when harm alleged is individual to each insured, each claimant must show causation and damages). Absent some ready source of uncontested data which could provide a basis for that assessment without individual trials, common questions of law and fact cannot be said to predominate as to liability. See Cazabat v. Metro. Prop. & Cas. Ins. Co., No. KC99-544, 2001 WL 267762 at \*1-2, 7 (R. I. Super. Feb. 23, 2001) (unpublished opinion) (in a breach of insurance contract case brought by a first-party insured against his auto insurer based upon the insurer's refusal to pay for the diminished value of the insured's vehicle, declining to certify the case for class action treatment under rule 23(b)(3), finding that several factors go into evaluating a vehicle's value, such as prior accidents, owner maintenance, prior ownership and replacement value, and that "individual [diminished value] claims made by policyholders inevitably contain individual situations personal to the assessment and support of a claim"; ultimately concluding that while the issue of whether the insurer breached its policies as a result of its practice of denying diminished value claims was a common question affecting the policyholders, "the individual facts needed to determine or support a claim under that theory predominate").<sup>3</sup>

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<sup>3</sup> Farmers is aware that RAP 10.4(h) prohibits citation to unpublished opinions of the Washington Court of Appeals and that

There is no such source here, because the claim files ordinarily do not address preaccident condition.

When the element of injury, and thus the issue of liability, is not amenable to common proof, as here, class certification of the liability determination is inappropriate. See, e.g., Newton, 259 F.3d at 187; Weisfeld v. Sun Chem. Corp., 210 F.R.D. 136, 143-44 (D.N.J. 2002), aff'd, 2004 WL 45152 (3d Cir. Jan 9, 2004); In re Methionine Antitrust Litig., 204 F.R.D. 161 (N.D. Cal. 2001).<sup>4</sup> Nothing in Moeller's opposition has countered this fatal flaw.

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Division Three of this Court has stated that while RAP 10.4(h) does not expressly prohibit citation to unpublished opinions of other jurisdictions, citation to such opinions is "inappropriate." See Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 472-73, 45 P.3d 594 (2002). Farmers is not aware of any ruling on this issue by the other divisions of this Court and, in any event, acknowledges that the unpublished decision of the Rhode Island superior court cited above lacks precedential value. Farmers respectfully submits, however, that the reasoning of the Rhode Island court may be helpful in this case. Cf. In re Marriage of Gilbert, 88 Wn. App. 362, 368-69, 945 P.2d 238 (1997) (characterizing as "highly persuasive" the analysis reflected in a federal district court's unpublished decision).

<sup>4</sup> In In re Linerboard Antitrust Litig., 305 F.3d 145, 155 (3d Cir. 2002), cert. denied, 538 U.S. 977 (2003), cited by Moeller, CR Br. at 40 n.12, the Third Circuit held that the district court did not err in determining that the plaintiffs had shown they could establish injury on a class-wide basis. Contrasting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154 (3d Cir. 2001), the Linerboard court said "in Newton it was clear that not all members of the putative class sustained

**D. The Class Certification Order Improperly Effected a Shift in the Burden of Proof as to Injury.**

Farmers' argument concerning the trial court's improper shifting of the burden of proof is not concerned with damages. Farmers' objection to the class certification order is that it improperly shifts the burden of proof on injury. Although Moeller has admitted that not every class member's car sustains diminished value in a collision, and therefore not every class member can be said to have suffered injury due to Farmers' refusal to pay first-party insureds' claims for diminished value, the class certification order effectively results in the creation of a presumption of injury and would require Farmers to call every class member in order to rebut that presumption and examine whether his or her claim of injury is sustainable. That the class action mechanism cannot be so used to shift the burden of proof was made clear in Sitton. 116 Wn. App. at 257-59; see also Muise v. GPU, Inc., 371 N.J. Super. 13,851 A.2d 799, 820-24, (N.J. Super. Ct. App. Div. 2004) (upholding trial court's rejection of plaintiffs' statistical

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injuries; here, all members sustained injuries because of the artificially increased prices." 305 F.3d at 157. This is precisely the distinction Moeller is ignoring here.

model for proving classwide damages where there was no valid presumption of injury to every class member).<sup>5</sup>

Moreover, the question of whether an insured has suffered injury is not a matter of whether Farmers has a provable defense. Rather, because proximately caused injury is an essential element of the cause of action, the issue is whether the class member has a viable claim in the first place. Thus, the trial court missed the boat when it certified the class and placed the burden on Farmers to “present evidence on individual claims supporting defenses unique to each claim . . . .” CP 1581.

**E. By His Silence, Moeller Admits That Bifurcation of a Finding of Injury Would Be Improper, and Both Moeller and the Trial Court Have Shown That They Do Not Contemplate Permitting Injury to Be Fully Tried Before the Claims Process.**

In its opening brief, Farmers argued that Moeller and the trial court were improperly bifurcating the issue of injury by requiring that issue to be considered in the claims process, despite what would be a prior

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<sup>5</sup> This case is unlike the antitrust cases Moeller cites in support of his proposal that trial courts can award aggregate damages based on data collected from defendants. CR Br. at 47. Here, Moeller proposed using auction data from vehicles not belonging to class members to determine damage *estimates* that would then be applied to the class as a whole. CR Br. at 10-11. Thus, the case is more like Muise, where the court properly rejected plaintiffs’ proposal to apply a presumption of injury based on a statistical model that used data from non-party sources.

determination of liability by the jury in the initial trial. Moeller does not argue that bifurcation of this sort would be proper.<sup>6</sup> Rather he denies that bifurcation of the liability issue is contemplated. CR Br. at 43-45. So, let's look at the record.

As explained at pages 7-12, supra, even Moeller's theory of diminished value would still require individualized examination of the preaccident condition of each and every car to determine whether, after proper repair, the insured's vehicle had sustained diminished value. (This would be a different inquiry from the hypothetical effort to show that nonluxury vehicles in general do not suffer diminished value.<sup>7</sup>) If injury is to be finally determined at the initial trial, Farmers must be permitted discovery from every insured regarding the preaccident condition of that insured's car. Cf. Muise, 851 A.2d at 828-30 (agreeing that opportunity to cross-examine plaintiffs' survey data was not meaningful where data collected did not reflect plaintiffs' actual damages).

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<sup>6</sup> In a footnote, Moeller asserts that bifurcation is frequently employed, CR Br. at 31 n.14, which is true. But this ignores the fact that the impropriety is in bifurcating a single issue, something not usual in bifurcation.

<sup>7</sup> See CR Br. at 44.

The logical and economical way of beginning such discovery would have been to include a questionnaire with the notice of the class action and to require any class member wishing to participate in any recovery to answer that questionnaire under oath and return it. When Farmers sought to include such a questionnaire with the notice, Moeller objected and the trial court sustained that objection. CP 1608-12; RP (Presentation, September 13, 2002) 44-63. That objection and ruling must show something about how Moeller and the trial court intended the class trial to be conducted.

Perhaps they intended to force Farmers to defend without ever allowing any discovery from class members who are the best (often only) sources of information on whether they suffered injury. This would go beyond even reversing the burden of proof, by also forbidding development of the evidence necessary for Farmers to disprove injury.

Or perhaps Moeller and the court intended to burden Farmers with later propounding individual discovery to all of those notified of the class action. Such later discovery would have involved needless expense to contact class members a second time, rather than taking advantage of the initial contact. The expense would have been further magnified because Farmers would have had to contact those who are not members of the class, but whose nonmembership could not be determined without

individual review of their claim files. Farmers would also have had to incur the expense of locating those who no longer lived at the address to which notice would be sent, because they would not have been required to provide current addresses. And none of this extra burden and expense would have contributed in any way to fair adjudication.

Either of these alternatives is obviously unjust. The only other option is to have the issue of actual injury addressed in the claims process. While this would have effected an improper bifurcation, deferral of the issue to the claims process would have preserved at least some semblance of fair adjudication. In construing the actions of the trial court, this Court ought not lightly to assume an intent to perpetrate an injustice. But assuming such an intent is the only way to avoid the conclusion that bifurcation was intended.

Even apart from the denial of the questionnaire, certification could not have been proper if issues concerning the preaccident condition of each of tens of thousands of cars would have to be litigated before the jury considering the liability issue. See Sitton, 116 Wn. App. at 258-59 (explaining that bifurcation might work if the bad faith issue were separated from a causation/damages phase, but vacating a trial plan order contemplating an award of aggregate damages before plaintiffs were required to prove individual causation); cf. Oda v. State, 111 Wn. App. 79,

96 n.8, 44 P.3d 8 (in a discrimination class action brought against the University of Washington, observing that in the liability phase, proof would not be confined to statistical analysis because to defend itself, “the University would be entitled to go into the rationale for every single pay decision” at issue), review denied, 147 Wn.2d 1018 (2002). In such a trial, individual issues would necessarily predominate over any common issues. For this reason, too, the trial court seemingly must have intended a bifurcation that would reserve those issues for the claims process.

Farmers’ argument on the impropriety of bifurcating the issue of injury cannot be viewed as anything other than a logical corollary to the argument that Moeller failed to demonstrate he will be able to prove classwide injury at trial. The bifurcation argument is not dependent on new facts and is merely an expansion of an argument made at length to the trial court during the class certification hearing. Accordingly, contrary to Moeller’s waiver argument, CR Br. at 41, the Court can and should consider Farmers’ argument. See, e.g., Newcomer v. Masini, 45 Wn. App. 284, 287, 724 P.2d 1122 (1986) (noting that appellate court can consider an argument raised for the first time on appeal if it is not dependent on new facts and is closely related to an issue advanced before the trial court); see generally Harris v. State, Dep’t of Labor & Indus., 120 Wn.2d 461, 468, 843 P.2d 1056 (1993) (acknowledging that even though

appellate courts generally decline to consider issues not raised before the trial court, they have discretion to consider such issues).

Moreover, Farmers raised the bifurcation issue when it filed objections to Moeller's proposed class notice and requested the sending of a discovery questionnaire with each notice. CP 1608-12. That document was filed and served on September 11, 2002, *i.e.*, two days before the trial court entered its written class certification order. CP 1608-35; CP 1569-83. Because the trial court had the opportunity to consider Farmers' bifurcation argument, Moeller's waiver argument is neither legally nor factually sound. *Cf. Newcomer*, 45 Wn. App. at 287 (concluding that raising of argument on motion for reconsideration preserves issue for consideration on appeal).

**II. The Basis on Which the Class Was Certified Does Not Provide Any Assurance That Farmers Could Obtain an Adjudication Binding on Class Members.**

Under Rule 23, a determination that an action may proceed as a class action must establish that, absent unforeseen circumstances, class members will be bound if the opposing party prevails on the merits.

Moeller does not dispute this point.

Instead, he seeks to distract this Court (as he successfully distracted the trial court) by offering a red herring: the fail-safe class *definition*. CR Br. at 48-49. It is true that one way in which a defendant

may be denied a binding victory is to define the class in such a way that the class will have no members who are not victorious. It is also true that the class here is not so defined. Farmers has never said the class was so defined. Rather, Farmers relied on a deeper principle, of which the prohibition on fail-safe definitions is only an example.

The problem here is that the class certification order was based on *predictions* by Moeller and his experts that proof of a particular type would permit Moeller to establish liability to all class members without any individualized proof.<sup>8</sup> But if Moeller failed in the effort to establish liability by generalized proof, *as he would, based on his own admissions*,<sup>9</sup> that failure would not rule out the possibility that some class members could establish claims with individualized proof. If the failure of Moeller's generalized proof resulted in a binding adjudication against class members, those with viable individual claims would be deprived of a fair opportunity to prove those claims.

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<sup>8</sup> Again, Farmers objects to Moeller's improper references to post-certification events. The question is whether the trial court abused its discretion based on the evidence before it. This Court should not be put in the position of assessing the merit (or lack of merit) of evidentiary submissions never considered by the trial court.

<sup>9</sup> This failure also demonstrates the trial court's error in accepting Moeller's *predictions* that common evidence could prove injury.

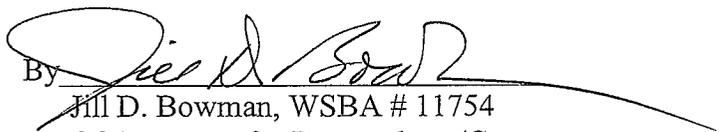
Farmers believes that neither the Rules of Civil Procedure nor due process would permit that result, and Moeller offers no authority to the contrary. As proponent of the class, it was Moeller's burden to show that class members could fairly be bound by a class-based adjudication, and this he failed to do.

### CONCLUSION

The trial court abused its discretion when it certified this case for class action treatment under CR 23(b)(3). If the Court reverses the trial court's summary judgment in whole or in part, it should also reverse the trial court's ruling on class certification.

DATED this 5<sup>th</sup> day of August, 2004.

STOEL RIVES LLP

By   
Jill D. Bowman, WSBA # 11754  
Of Attorneys for Respondents/Cross  
Appellants

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

DAVID MOELLER,

Respondent/Plaintiff,

v.

FARMERS INSURANCE COMPANY OF  
WASHINGTON and FARMERS  
INSURANCE EXCHANGE,

Petitioners/Defendants.

No. 30880-1-II

CERTIFICATE OF SERVICE AND  
FILING

I, LaVonne J. Arregui, certify that at all times mentioned herein I was and now am a citizen of the United States of America and a resident of the state of Washington, over the age of eighteen years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is that of Stoel Rives LLP, 3600 One Union Square, 600 University Street, Seattle, Washington 98101.

On August 6, 2004, I caused a true and correct copy of the following documents to be served upon the following individuals in the manner indicated:

1. Reply Brief of Respondents/Cross Appellants; and
2. Certificate of Service.

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HANSEN, P.S.  
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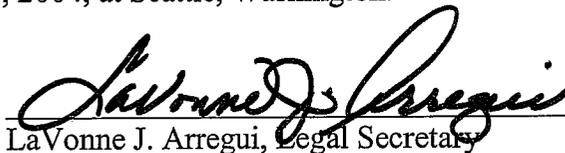
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On the same date, I caused an original and one copy of the documents to be filed by mailing the same, postage prepaid, to:

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950 Broadway, #300  
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on August 6, 2004, at Seattle, Washington.

  
LaVonne J. Arregui, Legal Secretary